Supreme Court, U.S.
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In The

Supreme Court of the United States

JULIO C. ARANA,

Petitioner,

versus

OCHSNER HEALTH PLAN, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Because *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) establishes that a group health plan's subrogation claims against a beneficiary are not actionable under Section 502(a) of ERISA, why should a beneficiary's state law action challenging a *fully-insured* plan's subrogation claims based on a saved state law be removable to federal court under Section 502(a)(1)(B) of ERISA?

2. Is a state law action that challenges a group health plan's subrogation claims based on Louisiana Revised Statutes 22:663 an independent action that is outside of the scope of Section 502(a)(1)(B) of ERISA?

3. Because Louisiana Revised Statutes 22:663 "regulates insurance" based on the factors set forth in *Kentucky Assoc. of Health Plans v. Miller*, 123 S.Ct. 1471 (2003), must ERISA's "saving" clause, 29 USC 514(b)(2)(A), be considered in connection with the two previous questions where a *fully-insured* group health plan is asserting the subrogation claims at issue?

LIST OF PARTIES

The parties in the Courts below are:

Plaintiff-Appellee-Petitioner: Julio C. Arana

Defendant-Appellant-Respondent: Ochsner Health Plan, Inc.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Petitioner, Julio C. Arana, respectfully requests and prays that this Court issue a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit that was entered on July 10, 2003.

OPINIONS AND JUDGMENTS BELOW

The Fifth Circuit's July 10, 2003 *en banc* Opinion and Judgment is reprinted in the Appendix at pages App. 1 through App. 14. The Fifth Circuit's January 16, 2003 Order granting rehearing *en banc* is reprinted at pages App. 15 through App. 16. The Fifth Circuit's August 15, 2002 Opinion by the original panel is reprinted at pages App. 17 through App. 36. The District Court's March 13, 2001 Opinion is reprinted at pages App. 40 through App. 51.

STATEMENT OF JURISDICTION

Mr. Arana's petition for a writ of certiorari seeks review of the July 10, 2003 *en banc* decision by the United States Fifth Circuit Court of Appeals in *Arana v. Ochsner Health Plan, Inc.*, 338 F.3d 433 (5th Cir. 2003); App. 1-14. No party sought rehearing of the Fifth Circuit's decision, and no extension of time to file this petition was granted.

This Court's jurisdiction to review this petition is based on 28 USC 1254(1).

STATUTES INVOLVED IN THE CASE

Section 502(a)(1)(B) of ERISA states:

> (a) A civil action may be brought –
>
> (1) by a participant or a beneficiary –
>
> (B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

See, 29 USC 1132(a)(1)(A). Section 514(b)(2)(A) of ERISA states: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." *See*, 29 USC 1144(b)(2)(B).

The Louisiana Insurance Code statute relied upon by Mr. Arana states:

> Notwithstanding any other provisions in this title to the contrary, no group policy of accident, health or hospitalization insurance, or of any group combination of these coverages, shall be issued by any *insurer* doing business in this state which by the terms of such policy group contract *excludes or reduces* the payment of benefits to or on behalf of an insured by reason of the fact that benefits have been paid under any other individually underwritten contract or plan of insurance for the same claim determination period.

> Any group provision in violation of this section shall be invalid.

See, Louisiana Revised Statutes 22:663 (*emphasis added*).

Part XII of the Louisiana Insurance Code concerns Health Maintenance Organizations ("HMOs"), and states that the rights of HMOs include:

> The power to coordinate benefits, subrogate to third party funds, and engage in the assignment of claims *to the extent that insurers are permitted to do so by the laws of this state.*

See, Louisiana Revised Statutes 22:2006(7) (*emphasis added*).

STATEMENT OF THE CASE

1. Statement of Facts

On July 5, 1998, Mr. Arana was severely injured when his vehicle was rearended while stopping for traffic on an Interstate highway in Louisiana. Mr. Arana was hospitalized for nearly 20 days, and has undergone six surgeries. Ochsner Health Plan, Inc. ("OHP"), an HMO organized under Louisiana law, issued a *fully-insured* group health insurance policy to Odette Lecler ("OHP Policy"), Mr. Arana's mother, as part of a group health plan offered by OHP to Lecler Printing Co., Inc., a Louisiana corporation. Mr. Arana is a beneficiary under the OHP Policy.

The OHP policy excludes coverage for "injuries or conditions" caused by the "acts or omissions" of a "third party" who is responsible or liable to the OHP Insured. If OHP nonetheless opts to reimburse its insured for any

such excluded claims, the OHP policy provides that OHP shall be subrogated to any recovery against any such third party, including other insurers. OHP paid about $150,000 in benefits to various healthcare providers who treated or provided services to Mr. Arana. Mr. Arana ultimately recovered $1,112,500.00 from four different insurers (Allstate, State Farm, Fireman's Fund and United Fire) that issued individually underwritten insurance policies.

Since 1996, OHP has used Subro-Audit, Inc. (now known as Trover Solutions, Inc. d/b/a Healthcare Recoveries, one of the *amici* below) to pursue subrogation recoveries. On November 2, 1999, Subro-Audit sent separate letters to Odette Lecler and to United Fire stating that OHP's subrogation rights entitled OHP to be reimbursed for $183,772.99. On November 29, 2000, Mr. Arana's counsel wrote Subro-Audit and OHP's attorney to demand that OHP withdraw its subrogation claims based on Louisiana Revised Statute ("La.R.S.") 22:663, which voids any terms or conditions included in any group insurance policy that purport to allow any such plans to exclude or reduce coverage by reason of individually underwritten coverage available to an injured person insured under the group plan. In a February 9, 2000 letter, the attorney for Subro-Audit and OHP responded that OHP refused to withdraw its subrogation claims.

On March 1, 2000, Mr. Arana filed a Petition in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, to challenge OHP's subrogation claims based on La.R.S. 22:663, and to obtain a judgment declaring that his tort recoveries from the four individual insurers belong to him, not OHP. At the time that Mr. Arana filed his state court lawsuit, the recoveries he received from three insurers had been disbursed, no

amounts were held in trust, and the lawsuit against United Fire was pending and did not settle until December 2000. Contending that Mr. Arana's state court lawsuit was a civil enforcement action under Section 502(a)(1)(B) of ERISA, OHP filed a notice of removal on April 7, 2000 to the Eastern District of Louisiana. There is no basis for diversity jurisdiction.

2. Course of Proceedings Below and Disposition in the Courts Below

Following motions filed by OHP and Mr. Arana, the district court below held that Mr. Arana's claims were only actionable under ERISA, and that La.R.S. 22:663 is not conflict preempted by ERISA, provided the "rule of decision" on the merits, and barred OHP's subrogation claims against Mr. Arana. *Arana v. Ochsner Health Plan, Inc.*, 134 F.2d 783, 788 (E.D. La. 2001); App. 40-51. The district court certified its ruling to the Fifth Circuit, and that Court granted OHP's Petition for Permissive Appeal filed pursuant to 28 USC 1292(b). App. 38-39 and 37.

On August 15, 2002, the Fifth Circuit held that Mr. Arana's claims were not completely preempted by ERISA, and ordered that the case be remanded to state court. *Arana v. Ochsner Health Plan*, 302 F.3d 462, 471-472 (5th Cir. 2002); App. 17-36. On January 16, 2003, the Fifth Circuit granted OHP's petition for *en banc* review and vacated the original panel's ruling. *Arana v. Ochsner Health Plan*, 319 F.3d 205 (5th Cir. 2003); App. 15-16. On July 10, 2003, the Fifth Circuit issued its *en banc* ruling that Mr. Arana's state law claims based on La.R.S. 22:663 were completely preempted by and actionable only under ERISA, and returned the determination of the "merits" to

the original panel, before whom those issues are now pending. *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003); App. 1-14.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's *En Banc* Decision Conflicts with Opinions by this Court and Other Circuits

The Fifth Circuit's original panel decision correctly determined that subject matter jurisdiction was lacking because Mr. Arana was not seeking to recover benefits or enforce any rights under the terms of the OHP Plan, and there was no federal law, right or question to be adjudicated *other than* preemption issues. Rather, this dispute solely concerns whether La.R.S. 22:663 bars OHP's state-law subrogation claims *against* Mr. Arana by reason of his tort recoveries from four other insurers.

1.1 The *En Banc* Fifth Circuit's Decision Is Inconsistent with this Court's Decisions Because Mr. Arana's Request for Declaratory Relief Based on La.R.S. 22:663 Is a Defense Against OHP's State-Law Subrogation Claims

The *en banc* Fifth Circuit determined that Mr. Arana's benefits "are under something of a cloud" because "although the benefits have already been paid, Arana has not fully 'recovered' because he has not obtained the benefits free and clear of OHP's claims." App. 9. The Fifth Circuit also held that Mr. Arana's lawsuit concerns the enforcement of "his rights under the terms of the plan, for he seeks to

determine his entitlement to retain the benefits based on the terms of the plan." App. 9. Because the OHP Plan states it is to be "construed, administered and enforced in accordance with the internal laws of the State of Louisiana" so long as such laws were not preempted by ERISA, the Fifth Circuit concluded that Mr. Arana's claims based on La.R.S. 22:663 sought to recover benefits under the terms of the plan. App. 10. However, policies issued or delivered to Louisiana are subject to Louisiana law regardless of any policy provisions. *See*, La.R.S. 22:213(B)(8) & 22:611. Thus, the Fifth Circuit's ruling means that *any* state law action seeking damages or relief against an ERISA plan based on a state law falls within the scope of Section 502(a)(1)(B), which is inconsistent with this Court's prior decisions and the plain language of Sections 502 and 514.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). The *en banc* Fifth Circuit's ruling disregarded the plain and ordinary meaning of Section 502(a)(1)(B). Mr. Arana's tort recoveries from *other* insurers solely derived from his *personal* rights under Louisiana law. Such recoveries are in no way dependent upon or derived from the OHP Policy, and are not "benefits due to [Arana] under the terms of the plan," and do not involve the enforcement of Arana's "rights under the terms of the plan." This dispute concerns OHP's assertion of *its* contractual subrogation rights, and Mr.

Arana's *defense* against such claims based on La.R.S. 22:663.[1]

Significantly, Mr. Arana only filed his lawsuit after OHP refused to withdraw its subrogation claims. "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952). This Court quoted the foregoing passage with approval in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 16, n. 14 (1983).

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), establishes that an ERISA plan's subrogation

[1] Under Louisiana law, health insurers have no implied subrogation or other legal rights against beneficiaries who receive recoveries from third parties. *Martin v. Louisiana Farm Bureau Casualty Ins. Co.*, 638 So.2d 1067, 1069 (La. 1994).

and reimbursement claims against a participant or beneficiary such as Mr. Arana are not actionable under Section 502 of ERISA, and indicates that such actions may only be brought in state court. *Id.*, 534 U.S. at 213-221. Thus, had OHP brought an action against Mr. Arana, it could not have done so in federal court. *Id.*; *See also*, *Westaff (USA) Inc. v. Arce*, 298 F.3d 1164, 1166-67 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003); and, *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 547-549 (7th Cir. 2003). Likewise, Mr. Arana could not have removed any state law action brought by OHP to federal court based on "federalizing" any defense or counterclaim under La.R.S. 22:663. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (federal defense); and, *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830-834 (2002) (federal counterclaim).

Because Mr. Arana's state court lawsuit was undeniably filed in response to OHP's refusal to withdraw subrogation claims that could only have been brought against Mr. Arana in state court, the *en banc* Fifth Circuit erred by failing to recognize that Mr. Arana's lawsuit was a defense to OHP's claims and that OHP's claims against Mr. Arana were state-law subrogation claims. Subject matter jurisdiction under Section 502(a)(1)(B) should not be based on the fortuity of Mr. Arana having filed suit first where OHP's claim and Mr. Arana's defenses are based on state law.

1.2 Mr. Arana Is Not Seeking to Recover Benefits Due to Him or to Clarify His Rights to Future Benefits under the Terms of the Plan

In *Pilot Life*, this Court described the relief available under Section 502(a) as follows:

> Under the civil enforcement provisions of § 502(a), a plan participant or beneficiary may sue to recover benefits under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against an administrator's improper refusal to pay benefits.

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 53 (1987). Section 502(a) represents "a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.*, 481 U.S. at 54. In *Rush Prudential HMO*, this Court again recognized that Section 502(a)(1)(B)'s preemptive scope includes cases where "... monetary awards were claimed as remedies to be provided at the ultimate step of plan enforcement," or where the state law "provided a form of ultimate relief in a judicial forum that added to the judicial remedies provided by ERISA." *Rush Prudential HMO v. Moran*, 536 U.S. 355, 378-379 (2002). Mr. Arana's lawsuit makes no such claim. Section 502(a) involves actions for breaches of *contractual* obligations to pay benefits or afford rights to participants, or breaches of duties under ERISA. Subrogation recoveries are not part of ERISA's "fair claims settlement procedures" and are not even mentioned in ERISA.

Courts of Appeals have similarly interpreted "benefits" under ERISA as referring "only to payments due to the plan participants or beneficiaries" and "to a participant's or beneficiary's right to receive monies from the plan administrator or the trustees." *Texas Life v. Gaylord Entertainment Co.*, 105 F.2d 210, 215 (5th Cir. 1997). The phrases "recover benefits due to him" and "clarify his rights to future benefits" contained in Section 502(a)(1)(B) necessarily

involve actions to recover or clarify rights regarding payments due for plan benefits where the Plan has refused to pay such benefits. *Roark v. Humana, Inc.*, 307 F.3d 298, 309 (5th Cir. 2002); and, *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 357 (3rd Cir. 1995), *cert. denied*, 516 U.S. 1009 (1995).

Because OHP has already paid the benefits on behalf of Mr. Arana, Mr. Arana's challenge to OHP's state-law subrogation claims does not seek the recovery of "benefits due to *him*" or the "enforcement of *his* rights" under the terms of the OHP Policy.

1.3 The *En Banc* Fifth Circuit's Decision Is Inconsistent with this Court's Decisions Regarding Complete Preemption

By focusing strictly on Section 502(a)(1)(B) to analyze the nature of Mr. Arana's claims, the Fifth Circuit departed from this Court's recognition of the "saving" clause's central role in any such determination. Section 502(a) "does not purport to reach every question relating to plans covered by ERISA. Furthermore, § 514(b)(2)(A) of ERISA, 29 U.S.C. § 1144(b)(2)(A), makes clear that Congress did not intend to pre-empt entirely every state cause of action relating to such plans." *Franchise Tax Board*, 463 U.S. at 25. Complete preemption under Section 502(a) is warranted only where ". . . federal law creates the cause of action or the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Id.*, 463 U.S. at 27-28. "[O]riginal federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state law claims." *Id.*, 463 U.S. at 13. "ERISA pre-emption, without more, does not convert a

state claim into an action arising under federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987).

In *Taylor*, *Pilot Life*, *Unum Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999) and *Rush Prudential HMO*, this Court addressed and decided whether the state laws at issue were saved. *FMC Corp. v. Holliday*, 498 U.S. 52, 58 & 64 (1990), and *Kentucky Assoc. of Health Plans v. Miller*, 123 S.Ct. 1471, 1477-79 (2003), establish that La.R.S. 22:663 is saved from preemption under Section 514 of ERISA where fully-insured plans are involved. "This returns the matter of subrogation to state law." *FMC Corp. v. Holliday*, 498 U.S. at 61.

Likewise, this Court has only found state law actions to be completely preempted under Section 502(a)(1)(B) where the state law may require the payment of benefits in addition to those recoverable under the terms of the Plan, or duplicates or adds to the remedies available under Section 502 of ERISA. *Taylor*, *Pilot Life*, *Ward* and *Rush Prudential HMO*, *supra*.

Mr. Arana's lawsuit undeniably does not seek the payment of *additional* benefits, and concerns a state law defense to OHP's state-law subrogation claims rather than any remedies available under Section 502. OHP's representatives testified by deposition that OHP's potential state-law subrogation rights play no part in its decisions to pay benefits. App. 29. Mr. Arana's defenses to OHP's state-law subrogation claims are based on La.R.S. 22:663, do not involve the interpretation or construction of ERISA or the OHP plan, are actionable under Louisiana law, and are not removable. *Toumajian v. Frailey*, 135 F.3d 648, 655 (9th Cir. 1998) ("The complete preemption doctrine is concerned with

a more limited set of state laws, those which fall within the scope of ERISA's civil enforcement scheme."); and, *Franchise Tax Board*, 463 U.S. 20-22. Because Mr. Arana does not seek to recover benefits under the OHP Policy or enforce remedies unavailable under ERISA, his state law action should not be preempted "because such a result would be plausible only if the state law itself were also pre-empted." *Franklin H. Williams Insurance Trust v. Travelers Ins. Co.*, 50 F.3d 144, 151 (2nd Cir. 1995).[2]

The Fifth Circuit relied on the "governing law" provision of the OHP plan to conclude that to the extent that La.R.S. 22:663 applied it was a right under the OHP plan. The "governing law" provision repeats what Louisiana law requires, which does not thereby make any such provision a "term of the plan." It is still Louisiana law that makes the subrogation and assignment provisions "invalid" (last sentence of La.R.S. 22:663) "at the date of issue" (La.R.S. 22:213(B)(8)), and expressly states that HMOs have "[t]he power to coordinate benefits, subrogate to third party funds, and engage in the assignment of claims *to the extent that insurers are permitted to do so* by the laws of this state" (La.R.S. 2006(7)) (*emphasis added*). Louisiana law, not the terms of the Plan or ERISA, *bars* OHP's state-law subrogation claims.

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[2] This is consistent with the Solicitor General's positions on behalf of the Department of Labor ("DOL") in the amicus briefs filed in *Unum* and *Rush Prudential HMO*. *See*, DOL *Unum* Brief, 1998 WL 839957, *22-23; and, DOL *Rush* Brief, 2001 WL 1480556, * 28, n. 14.

1.4 The *En Banc* Fifth Circuit's Decision Is Inconsistent with this Court's Decisions Regarding the Right to Bring Independent State Law Claims

This Court has long analogized complete preemption under ERISA to the exclusive nature of the remedies available under Section 301(a) of the Labor Management Relations Act ("LMRA"). *Taylor*, 481 U.S. at 64-67; and, *Pilot Life*, 481 U.S. at 55-56. The Fifth Circuit's decision is inconsistent with this Court's decisions in cases involving the LMRA that allowed state law claims to be maintained where such actions are independent of and do not require the interpretation of a collective-bargaining agreement. This Court has not addressed the extension of this rationale to state law actions based on breaches of *saved* state laws that will not require the interpretation of an ERISA plan or the payment of *additional* benefits, and should do so for these reasons.

In *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988), this Court held that a state court action under an Illinois law prohibiting employers from discharging employees for filing workers' compensation claims was "independent" of any claims under a collective-bargaining agreement governed by Section 301 of the LMRA. *Id.*, 486 U.S. at 406-410. This Court concluded that the plaintiff's state law claims were independent and thus not preempted because "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.*, 486 U.S. at 407. This Court reasoned that "§ 301 preemption merely insures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may

provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements." *Id.*, 486 U.S. at 409. This remains true even if the separate state and federal claims "would require addressing precisely the same set of facts." *Id.*, 486 U.S. at 410.

"Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. at 394. "It is true that when a defense to a state law claim is based on terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule – that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Id.*, 482 U.S. at 398-399.

"Finally, we were clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). The following paraphrases and applies this Court's discussion of the claim addressed in *Livadas* to Mr. Arana's dispute with OHP: "the primary text for deciding whether [Arana is] entitled to [his tort recoveries is] not the [OHP Plan], but [La.R.S. 22:663]." *Id.*, 512 U.S. at 124. As in *Livadas*, the only issue raised

by Mr. Arana's claim is a question of state law – the interpretation and application of La.R.S. 22:663.

Taylor and *Pilot Life* as well as ERISA's saving clause support applying *Lingle*'s rationale to state law actions that concern ERISA plans. Section 502(a) should be interpreted to permit "independent" state law actions against fully-insured plans such as the OHP Plan because there are no disputes regarding, and thus no need to interpret, the terms of the OHP Plan. While state laws establishing rights or procedures that may require the payment of *additional* benefits fall within the scope of Section 502(a)(1)(B), as was the case in *Unum* and *Rush Prudential HMO, supra*, the same is not true for state laws like La.R.S. 22:663 that *bar* a group health plan's enforcement of subrogation or other rights by reason of other insurance available to a beneficiary, as the Fifth Circuit's original panel ruling correctly recognized. *Arana v. Ochsner Health Plan*, 302 F.3d 462, 471-472 (5th Cir. 2002).[3]

There is a qualitative difference between state laws that mandate certain rights and procedures requiring the payment of benefits and state laws prohibiting a plan from reducing or excluding benefits by reason of other insurance coverage. State law prohibitions against a fully-insured plan's exercise of certain powers or rights do not

[3] One district judge has concluded that La.R.S. 22:663 is not subject to ordinary or complete preemption, that its provisions do not conflict with ERISA, and that it may be enforced under Louisiana law. *Hamilton v. United HealthCare of Louisiana, Inc.*, 2001 WL 536300 (E.D. La. May 17, 2001).

require that the terms of the plan be construed or interpreted, and are independent and distinct from any plan-created subrogation rights. Mr. Arana does not dispute that OHP has paid benefits on his behalf or that the OHP Plan includes subrogation provisions. The adjudication of Mr. Arana's defense against OHP's claims will only require the interpretation of La.R.S. 22:663, not the OHP Policy. State laws that limit a group health plan's rights to subrogate against other insurance do not fall within the scope of Section 502(a) of ERISA.

1.5 The Seventh Circuit Has Held that Similar Claims Arise Under and Are Actionable under State Law

In *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544 (7th Cir. April 1, 2003), Sevilla recovered $22,000 in a tort claim. Primax thereafter sought to recover $2,483.71 paid under a health plan, but refused the "common fund" demand by Sevilla's attorney for payment of one-third of $2,483.71. After a state court lawsuit had been pending for several years, Primax filed a federal lawsuit against Sevilla seeking a declaration "that the plan overrides the common fund doctrine," which the district court dismissed for "want of jurisdiction." *Id.* at 547. The Seventh Circuit rejected Primax's argument for jurisdiction under Section 502(a)(3):

> Primax doesn't want the check as such; it wants the money, and it claims that under the plan Sevilla owes the money to it. That is a claim of breach of contract, which is a classic legal claim. Almost any legal claim can be given the form of an equitable claim (that is, a claim seeking to do

> or not do something), but such games with form should be discouraged.

Id. at 548. The Seventh Circuit likewise rejected Primax's jurisdiction arguments based on Section 502(a)(1)(B):

> So we must consider whether if Primax had not released its claim, and therefore Sevilla were suing Primax to force it to endorse a check, the case would arise under ERISA. It would not; it would arise under the common fund doctrine of Illinois.

Id. at 548. "[T]he fact that a defendant may be able to interpose ERISA preemption as a defense to a suit under state law does not confer federal jurisdiction over the suit; federal jurisdiction depends on the claim, not upon defenses, even ERISA preemption defenses. Anyway, we have held that ERISA does not preempt common fund claims. [Citations Omitted]." *Id.* at 549. The Seventh Circuit's decision in *Primax Recoveries* plainly conflicts with the Fifth Circuit's decision below.

Likewise, in *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997), the Court remanded a state law claim to apportion a tort settlement fund between an ERISA plan and the beneficiary's attorney. "The fundamental claim – that the Blackburns should be credited, for purposes of their duty to reimburse Sundstrand [the ERISA plan], with sums paid to the attorney whose work produced the fund arises under state law." *Id.* at 494. The Court rejected the argument that the claim was completely preempted because "neither the original tort action nor the petition to adjudicate adverse claims to the settlement fund sought a payment from the plan. Section 502 is irrelevant." *Id.*

The Seventh Circuit has extended the approach used by this Court when evaluating complete preemption under the LMRA to similar issues involving ERISA plans. In *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996), the Court held that in addition to addressing whether the plaintiff's cause of action falls within the scope of Section 502, the Court must also consider "whether the plaintiff's state law claim cannot be resolved without an interpretation of the contract governed by federal law." *Id.* at 1487; *See also*, *Speciale v. Seybold*, 147 F.3d 612, 615 (7th Cir. 1998), *cert. denied*, 525 U.S. 1017 (1999) ("Where plaintiff seeks recovery for breach of a duty imposed by state law; and the claims does not involve the interpretation of contract terms, there is no complete preemption."); and, *Community Ins. Co. v. Roe*, 85 F.Supp.2d 300, 814-816 (S.D. Ohio 1999). While the Fifth Circuit's original panel below used this factor when assessing complete preemption (App. 29-33), the Fifth Circuit's *en banc* decision solely considered whether Mr. Arana's claim fell within the scope of Section 502(a).

1.6 The Eleventh Circuit Also Considers Whether the Claim Is Based on a State Law When Addressing Complete Preemption

In *Ervast v. Flexible Products Co.*, 2003 WL 22203472 (11th Cir. Sept. 24, 2003), a former employee filed a state court lawsuit for damages against his employer, Flexible, based on state law breaches of duty because Flexible failed to disclose its pending merger discussions with Dow Chemical at the time he made his decision to "cash out" his interests in an Employee Stock Ownership Plan following his resignation. The former employee claimed he

would have cashed out later and made more money had Flexible disclosed the pending merger discussions. The Eleventh Circuit remanded the case to state court. "Although state-law claims involving the denial of benefits invariably yield to ERISA substantive law, the presence of an ERISA plan within the facts of a case does not on its own, automatically subject the litigant to federal question jurisdiction . . . [T]he court evaluating federal question jurisdiction must parse the elements of the claim to ascertain whether the claim, and not just the factual scenario, states a claim resonant of recovery under § 1132." *Id.* at *5. Because Flexible's duties derived from state law rather than the ESOP Plan or ERISA, the Eleventh Circuit determined that subject matter jurisdiction was lacking. "The duties owed to him by Flexible and allegedly breached are grounded in state law and not ERISA. The claims did not seek relief akin to that available under § 1132 and could not form the basis of removal under federal question jurisdiction." *Id.* at *8.

The Eleventh Circuit's decision in *Ervast* thus supports the Fifth Circuit's original panel decision because Mr. Arana's defenses against OHP's state-law subrogation claims are based solely on state law.

CONCLUSION

Julio C. Arana, petitioner, requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30922

JULIO C ARANA

Plaintiff-Appellee

v.

OCHSNER HEALTH PLAN

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed July 10, 2003)

Before KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, and PRADO, Circuit Judges.

KING, Chief Judge:

Julio C. Arana sued Ochsner Health Plan, Inc. in state court to obtain a declaration that he is entitled to retain tort settlement proceeds free of Ochsner Health Plan, Inc.'s claim for reimbursement of health care benefits previously paid for Arana's account and to obtain attorney's fees and statutory penalties as well. The case was removed to federal court. The district court granted summary judgment for Arana. A panel of this court reversed, holding that the district court did not have subject

matter jurisdiction, and directed that the case be remanded to state court. *See Arana v. Ochsner Health Plan, Inc.*, 302 F.3d 462 (5th Cir. 2002), *vacated and reh'g en banc granted*, 319 F.3d 205 (5th Cir. 2003). Rehearing en banc was granted, thereby vacating the panel opinion. Because Arana states a claim to recover benefits or to enforce his rights that is completely preempted by ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (2000), we find that the district court had federal subject matter jurisdiction. We do not address the merits of this case, instead returning the case to the panel for that purpose.

I. FACTUAL AND PROCEDURAL HISTORY

A. Facts

Julio C. Arana ("Arana") was injured in a car accident. Ochsner Health Plan, Inc. ("OHP") paid approximately $180,000 in benefits under the terms of an employer-sponsored health plan offered by Arana's mother's employer. Arana then asserted tort claims against, and ultimately settled with, three other insurance companies.[1] Though his mother's health benefits plan, which all parties agree is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (2000), required Arana to notify OHP of any litigation or settlement of claims against third parties for which OHP had made payment, Arana did not do so. OHP learned of the settlements and contacted Arana's mother. OHP claimed a right to subrogation of Arana's personal injury

[1] Approximately $150,000 of the tort settlements is being held in Arana's attorney's trust fund account.

cause of action and reimbursement of benefits it paid for Arana's injuries to the extent that Arana was compensated by other insurers.[2]

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[2] The Group Health Services Agreement is the ERISA plan between OHP (here designated O/SCHP) and Arana. The portion at issue in this case reads:

> If any Member is injured by an act or omission of a third party and if such third party and/or any other third party or entity, including but not limited to the Member's medical, health and accident, uninsured/underinsured motorist, school, and/or no fault insurer(s) (each referred to hereafter as a "Third Party"), is subsequently determined to be liable and/or responsible for the Expenses incurred because of such act or omission or by contract, O/SCHP will be subrogated to, and may enforce the rights of, the Member against the Third Party(ies) for such Expenses.
>
> In addition to and notwithstanding the subrogation rights granted to O/SCHP, by becoming a Member of O/SCHP and/or accepting benefits under O/SCHP and the provision of health care services by O/SCHP, including payment of the Expenses, each Member does hereby assign and shall be deemed to have assigned to O/SCHP all rights and claims against such Third Party(ies) for such Expenses, including the right to compromise claims independently of the Member, to commence and prosecute any legal proceeding, and to pursue judgments through collection, in its name or in the Member's name.
>
> . . .
>
> Any settlement, compromise, or release by a Member in favor of a Third Party, made in violation of the provisions of this Section 1, shall be deemed to include the full amount due O/SCHP, up to the amount of the settlement, compromise, or release, regardless of whether the Member receives full or partial recovery from such Third Party, and any funds received by the Member shall be held in trust by the Member and/or his attorney or other representative and paid to O/SCHP without any deductions for attorneys' fees or other costs.

B. District Court Decision

Arana sued OHP in Louisiana state court, seeking a declaratory judgment. Arana asked the court to find that OHP could not obtain reimbursement from him for amounts OHP previously paid for his medical bills. Arana raised two claims: (1) a request for a declaratory judgment "requiring OHP to release its notice of lien and to withdraw and release OHP's subrogation, reimbursement and assignment claims" because LA. REV. STAT. § 22:663[3] bars OHP from asserting these rights; and (2) a request for statutory penalties and attorney's fees under LA. REV. STAT. § 22:657[4] for OHP's allegedly wrongful attempt to

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[3] Section 22:663 reads:

> Notwithstanding any other provisions in this title to the contrary, no group policy of accident, health or hospitalization insurance, or of any group combination of these coverages, shall be issued by any insurer doing business in this state which by the terms of such policy group contract excludes or reduces the payment of benefits to or on behalf of an insured by reason of the fact that benefits have been paid under any other individually underwritten contract or plan of insurance for the same claim determination period. Any group policy provision in violation of this section shall be invalid.

LA. REV. STAT. ANN. § 22:663 (West 1995 & Supp. 2003).

[4] Section 22:657 reads, in part:

> All claims arising under the terms of health and accident contracts issued in this state, except as provided in Subsection B, shall be paid not more than thirty days from the date upon which written notice and proof of claim, in the form required by the terms of the policy, are furnished to the insurer unless just and reasonable grounds, such as would put a reasonable and prudent businessman on his guard, exist. The insurer shall make payment at least every thirty days to the assured during that part of the period of his disability covered by the policy or contract of insurance during which

(Continued on following page)

assert a lien against his tort settlements and obtain reimbursement from him. Arana brought the case as a class action, but no class has been certified.

OHP removed the case to federal district court, basing subject matter jurisdiction on the argument that ERISA completely preempts Arana's claims. The district court found that there was subject matter jurisdiction because Arana stated a claim "to recover benefits" under ERISA § 502(a)(1)(B).[5] The district court then granted partial summary judgment to Arana on the merits of his claims.

C. Fifth Circuit Proceedings

On appeal, Arana argued that the federal courts do not have subject matter jurisdiction over this action because his claims are not completely preempted by ERISA. The panel agreed. The panel held that Arana's first claim is not a claim "to recover benefits" within the

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the insured is entitled to such payments. Failure to comply with the provisions of this Section shall subject the insurer to a penalty payable to the insured of double the amount of the health and accident benefits due under the terms of the policy or contract during the period of delay, together with attorney's fees to be determined by the court. Any court of competent jurisdiction in the parish where the insured lives or has his domicile, excepting a justice of the peace court, shall have jurisdiction to try such cases.

LA. REV. STAT. ANN. § 22:657 (West 1995 & Supp. 2003).

[5] The district court reasoned:

Arana's argument that his claim is brought only under state law because it is not a claim to obtain benefits is unconvincing. Even though the benefits have been paid, Ochsner is attempting to reduce the amount of the benefits paid under the health plan. The claim is brought under § 502(a) . . .

scope of ERISA § 502(a)(1)(B) because OHP has already paid Arana all of the health benefits due and Arana is not seeking additional benefits. The panel also rejected OHP's argument that Arana's first claim is one "to enforce his rights under the terms of the plan" under § 502(a)(1)(B) because Arana is not seeking to enforce the plan's terms but rather to declare a portion of the plan illegal under Louisiana law if enforced. Finally, the panel determined that Arana's second claim, which seeks penalties and attorney's fees, is not within the scope of ERISA § 502(a) because, though LA. REV. STAT. § 22:657 may conflict with ERISA, a mere conflict with federal law is insufficient for jurisdiction.

We granted OHP's petition for rehearing *en banc* to consider the jurisdictional issue.[6]

II. STANDARD OF REVIEW

We review challenges to our subject matter jurisdiction *de novo*. *See, e.g., Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623, 628 (5th Cir. 2002).

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[6] Participating in this case as *amici curiae* are Louisiana Managed Health Care Association, Inc., et al.; Benefit Recovery, Inc.; Elaine L. Chao, Secretary of the United States Department of Labor; and Professors Edward H. Cooper and Dana M. Muir of the University of Michigan Law School. Professors Cooper and Muir filed their brief at the request of the court, and we are grateful for their participation.

III. DISCUSSION OF SUBJECT MATTER JURISDICTION

A. Requirements for Complete Preemption Subject Matter Jurisdiction

The federal removal statute authorizes removal to federal court of a civil action filed in state court if the claim is one "arising under" federal law or if there is diversity jurisdiction and the defendant is not a citizen of the state where the action is brought.[7] *See* 28 U.S.C. § 1441(b) (2000). As the Supreme Court recently explained:

> To determine whether the claim arises under federal law, we examine the "well pleaded" allegations of the complaint and ignore potential defenses: "A suit arises under the Constitution and the laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States." *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152 (1908); *see Taylor v. Anderson,* 234 U.S. 74 (1914). . . . As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.

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[7] OHP and Arana[illegible]re citizens of Louisiana, so removal is only proper in this case if the[illegible]e is federal question jurisdiction.

Beneficial Nat'l Bank v. Anderson, 123 S. Ct. 2058, 2062 (2003).

There is an exception to the well-pleaded complaint rule, though, if Congress "so completely pre-empt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 63-64 (1987). In *Metropolitan Life Insurance Co. v. Taylor,* the Supreme Court found that state law claims seeking relief within the scope of ERISA § 502(a)(1)(B) are completely preempted. *See id.* at 62-66.

B. Analysis of Arana's LA. REV. STAT. § 22:663 Claim

Arana's first claim requests a declaratory judgment "requiring OHP to release its notice of lien and to withdraw and release OHP's subrogation, reimbursement, and assignment claims" because such claims violate LA. REV. STAT. § 22:663. This claim is completely preempted because it falls within the scope of ERISA § 502(a)(1)(B). Section 502(a)(1)(B) reads:

> (a) A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . .

29 U.S.C. § 1132 (2000).

Arana's LA. REV. STAT. § 22:663 claim can fairly be characterized either as a claim "to recover benefits due to him under the terms of his plan" or as a claim "to enforce his rights under the terms of the plan."[8] As it stands, Arana's benefits are under something of a cloud, for OHP is asserting a right to be reimbursed for the benefits it has paid for his account. It could be said, then, that although the benefits have already been paid, Arana has not fully "recovered" them because he has not obtained the benefits free and clear of OHP's claims. Alternatively, one could say that Arana seeks to enforce his rights under the terms of the plan, for he seeks to determine his entitlement to retain the benefits based on the terms of the plan.

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[8] *See Clancy v. Employers Health Insurance Co.*, 82 F. Supp. 2d 589, 591-92, 596 (E.D. La. 1999), *aff'd*, 248 F.3d 1142 (5th Cir. 2001) (unpublished opinion), *cert. denied*, 534 U.S. 820 (2001) (finding that a suit based on LA. REV. STAT. § 22:663 seeking to obtain benefits and prevent an insurer from recovering benefits it had already paid fell within § 502(a)(1)(B) as a claim "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan"); *see also Coughlin v. Health Care Serv. Corp.*, 244 F. Supp. 2d 883, 885-89 (N.D. Ill. 2002) (finding than [sic] the insureds' declaratory judgment class action claims, which sought to retain tort settlements in light of the insurers' claims for reimbursement, were claims to "enforce [their] rights under the terms of the plan" and to "clarify [their] rights to future benefits under the terms of the plan"); *Carducci v. Aetna U.S. Healthcare*, 204 F. Supp. 2d 796, 799-803 (D.N.J. 2002) (holding that the insureds' suits to recover funds their ERISA plans had obtained via subrogation liens on their tort settlement proceeds were suits for "benefits due" under their plans); *Franks v. Prudential Health Care Plan, Inc.*, 164 F. Supp. 2d 865, 868-69 (W.D. Tex. 2001) (finding that an insured's suit to recover amounts he had paid to reimburse his ERISA plan from tort settlement proceeds was a suit "to recover benefits due him under the terms of his plan, *to enforce his rights under the terms of the plan*, or to clarify his rights to future benefits under the terms of the plan") (emphasis in original).

Arana contends that he does not seek relief under ERISA § 502(a)(1)(B) because he claims entitlement to relief under Louisiana law, not under the terms of his ERISA plan. That is, according to Arana, LA. REV. STAT. § 22:663 nullifies the term of his ERISA plan which provides for reimbursement, so his claims do not seek relief under the plan's terms. As we see it, however, Arana does seek benefits "under the terms of the plan" because the plan explicitly provides that the plan is to be enforced according to Louisiana law. Specifically, the plan contains a choice-of-law clause mandating that the plan be construed in light of Louisiana law so long as Louisiana law is not preempted by ERISA.[9] Our holding that Arana seeks relief under the terms of the plan is bolstered by a Seventh Circuit decision which also found that a claim seeking benefits premised on an ERISA plan read in conjunction with state law falls within § 502(a)(1)(B). *See Plumb v. Fluid Pump Serv., Inc.*, 124 F.3d 849, 860-62 (7th Cir. 1997); *cf. Ward*, 526 U.S. at 377 ("Ward sued under § 502(a)(1)(B) 'to recover benefits due . . . under the terms of the plan.' The [California] notice-prejudice rule supplied the relevant rule of decision for this § 502(a) suit."). Thus, Arana's claim seeks relief under the terms of his ERISA plan, as ERISA § 502(a)(1)(B) requires.

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[9] This clause reads:

> **Section 15. Governing Law**: This Agreement shall be construed, administered and enforced as a Louisiana contract according to the internal laws of the State of Louisiana. However, it is specifically intended that to the extent ERISA or any other federal law preempts state law, this Agreement shall be construed, administered and enforced in accordance with such laws.

Arana's final argument is that, even if his claim falls within ERISA § 502 so that it is completely preempted, there is no jurisdiction because his claim is not conflict-preempted as well. Conflict preemption, also known as ordinary preemption, arises when a federal law conflicts with state law, thus providing a federal defense to a state law claim, but does not completely preempt the field of state law so as to transform a state law claim into a federal claim. *See, e.g., Heimann v. Nat'l Elevator Indus. Pension Fund,* 187 F.3d 493, 499-500 (5th Cir. 1999). Arana reasons that although his claim is conflict-preempted under ERISA § 514(a), 29 U.S.C. § 1144(a) (2000), because it is a claim that "relates to" an ERISA plan, it is saved from preemption because LA. REV. STAT. § 22:663 is a state law that "regulates insurance" under § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (2000), within the meaning of *FMC Corp. v. Holliday,* 498 U.S. 52 (1990), and *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 123 S. Ct. 1471 (2003).

This circuit has not been content to require only § 502 complete preemption for federal jurisdiction, requiring § 514 conflict preemption as well. *See, e.g., Copling v. Container Store, Inc.,* 174 F.3d 590, 597 n.14 (5th Cir. 1999); *McClelland v. Gronwaldt,* 155 F.3d 507, 517 & n.31 (5th Cir. 1998). The source of this two-part test, as best we can tell, is *Hartle v. Packard Electric,* where we stated:

> Federal preemption is ordinarily raised as a matter of defense, and therefore does not authorize removal to federal court. In *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987), however, the United States Supreme Court held that state law actions displaced by the civil enforcement provisions of ERISA can be characterized as claims arising

> under federal law. Therefore, such actions can properly be removed to federal court even though ERISA preemption does not appear on the face of the complaint.
>
> A prerequisite to this exercise of jurisdiction, however, is that the state law claims actually be preempted by ERISA.

877 F.2d 354, 355 (5th Cir. 1989). Succeeding cases have been controlled by this language.

Today, in view of the possibility that Arana's claim is not preempted by § 514(a), we must revisit our two-part test for finding complete preemption jurisdiction. First, *Metropolitan Life,* to which the *Hartle* case referred, did not hold that a two-part test is required in order to find complete preemption. In *Metropolitan Life,* in assessing whether removal of the common law contract and tort claims at issue was proper, the Supreme Court simply noted that the claims were preempted by § 514 and then went on to consider § 502(a) complete preemption. *See* 481 U.S. at 62-63. Second, Supreme Court cases decided after *Metropolitan Life* (and after we adopted our two-part test) have made it clear that § 514 conflict preemption is not necessary to find complete preemption jurisdiction. In *UNUM Life Insurance Co. of America v. Ward*, the Court determined that a California state law was not preempted under § 514 (because it was a law regulating insurance) but acknowledged that the plaintiff properly brought a claim in federal court under ERISA § 502(a). *See* 526 U.S. 358, 365-77 (1999). Similarly, in *Rush Prudential HMO, Inc. v. Moran*, the Court found that ERISA § 514 did not preempt the Illinois HMO Act (because it too was a law regulating insurance) but nonetheless noted, and did not question the fact that, the Seventh Circuit found federal

subject matter jurisdiction over the claim under ERISA § 502(a). *See* 536 U.S. 355, 363-87 (2002). These cases clearly indicate, then, that there may be complete preemption subject matter jurisdiction over a claim that falls within ERISA § 502(a) even though that claim is not conflict-preempted by ERISA § 514.

We thus hold that only complete preemption of a claim under ERISA § 502(a) is required for removal jurisdiction; conflict preemption under ERISA § 514 is not required;[10] and we overrule the relevant portions of our precedent to the contrary.[11] Put simply, there is complete preemption jurisdiction over a claim that seeks relief "within the scope of the civil enforcement provisions of § 502(a)." *Metro. Life Ins. Co.*, 481 U.S. at 66.[12]

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[10] We thus do not address whether Arana's LA. REV. STAT. § 22:663 claim is conflict-preempted under ERISA § 514.

[11] These portions of our precedent include: *Heimann*, 187 F.3d 493, 502 (5th Cir. 1999); *Copling*, 174 F.3d at 597 n.14; *McClelland*, 155 F.3d at 517 & n.31; *Hartle*, 877 F.2d at 355.

[12] Because the district court correctly held that there is subject matter jurisdiction over Arana's LA. REV. STAT. § 22:663 claim, we need not address OHP's argument that Arana's LA. REV. STAT. § 22:657 claim for attorney's fees and penalties provides an independent basis of jurisdiction. We also decline to address OHP's argument that there is subject matter jurisdiction because OHP has a federal claim under *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Franchise Tax Board v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1 (1983).

IV. CONCLUSION

We find that there is subject matter jurisdiction over this case. We RETURN the case to the panel to address the merits of Arana's claims.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30922

JULIO C. ARANA

Plaintiff-Appellee

versus

OCHSNER HEALTH PLAN

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING EN BANC

(Opinion August 15, 2002, 5 Cir., 2002, ___ F.3d ___)

January 16, 2003

BEFORE: KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS and CLEMENT, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-30922

JULIO C. ARANA,

Plaintiff-Appellee

VERSUS

OCHSNER HEALTH PLAN, INC.,

Defendant-Appellant

Appeal from the United States District Court
For the Eastern District of Louisiana

(Filed Aug. 15, 2002)

Before KING, Chief Judge, PARKER, Circuit Judge, and ELLISON,* District Judge.

ELLISON, District Judge:

Defendant-Appellant Ochsner Health Plan, Inc. ("OHP") requested and received certification under 28 U.S.C. § 1292(b) to appeal the district court's order denying its motion to dismiss or, alternatively, motion for summary judgment, and granting partial summary judgment to Plaintiff-Appellee Julio C. Arana ("Arana"). We hold that the district court erred to the extent that it determined it had jurisdiction over the instant action, and we reverse the district court's order on that basis and direct that the case be remanded to state court. Because

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* District Judge of the Southern District of Texas, sitting by designation.

we find that subject matter jurisdiction is lacking, we do not reach the substantive issues raised on appeal.

I. FACTS AND PROCEEDINGS BELOW

On July 5, 1998, Arana sustained serious injuries when a 1996 Ford Crown Victoria struck the rear of a 1995 Nissan Pathfinder, operated by Arana and owned by his mother, Odette LeCler. At the time of the accident, and at all relevant times thereafter, Arana was a dependent beneficiary under the employee welfare benefit plan established by his mother's employer, LeCler Printing Company.[1] OHP provided health benefits to participants and beneficiaries of the LeCler Printing employee benefit plan ("the LeCler Plan") pursuant to a Group Health Services Agreement ("GHSA") between OHP and the employer. After the automobile accident, Arana's health care providers submitted to OHP claims for services rendered to Arana, and OHP has paid approximately $180,000 in health benefits for treatment of Arana's accident-related injuries.

In addition to the health benefits paid by OHP, coverage for the accident also was available under four automobile insurance policies: a State Farm liability policy covering the Crown Victoria, an Allstate liability policy carried by the non-owner operator of that vehicle, a Fireman's Fund uninsured motorist insurance policy issued on the Pathfinder, and an excess uninsured motorist policy underwritten by United Fire. In October, 1998,

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[1] For purposes of this appeal, Arana concedes that the LeCler employee welfare benefit plan is a plan governed by ERISA.

State Farm and Allstate paid their respective policy limits to Arana, in the total amount of $150,000. Fireman's Fund paid Arana $487,500, on a policy with a $500,000 limit. Finally, in late 2000, United Fire, which provided $2 million in excess uninsured motorist coverage subject to $650,000 in underlying limits, settled with Arana for $475,000. Prior to their settlements with Arana, Fireman's Fund and United Fire both were named as defendants in Civil Action No. 98-2927, which Arana filed in the Eastern District of Louisiana in connection with his automobile accident. Pursuant to the terms of the settlement of that lawsuit, Arana's attorney has maintained in a trust account $150,000 out of the settlement proceeds obtained from United Fire. The remainder of the funds received from the four automobile insurers has been disbursed.

During the relevant time period, OHP maintained an arrangement under which Subro Audit, Inc., a third-party contractor and subrogation specialist, handled subrogation for OHP. On November 2, 1999, while the federal tort lawsuit remained pending, Subro Audit wrote to Arana's mother and to United Fire, notifying both that OHP claimed a contractual right to reimbursement of the health benefits it had paid on Arana's behalf.

Arana disputed OHP's right to pursue subrogation and/or reimbursement, and filed the instant lawsuit against OHP in the 24th Judicial District Court for the Parish of Jefferson, both on his own behalf and on behalf of other similarly situated individuals. Specifically, in his petition Arana requests a declaratory judgment "requiring OHP to release its notice of lien and to withdraw and release OHP's subrogation, reimbursement, and assignment claims" against Arana, Fireman's Fund, and/or United Fire. Arana asserts that such claims violate LA.

REV. STAT. 22:663.[2] Arana also asks that OHP be ordered to pay statutory penalties and attorney's fees pursuant to LA. REV. STAT. 22:657.[3]

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[2] LA. REV. STAT. 22:663 provides:

> Notwithstanding any other provisions in this title to the contrary, no group policy of accident, health or hospitalization insurance, or of any group combination of these coverages, shall be issued by any insurer doing business in this state which by the terms of such policy group contract excludes or reduces the payment of benefits to or on behalf of an insured by reason of the fact that benefits have been paid under any other individually underwritten contract or plan of insurance for the same claim determination period. Any group policy provision in violation of this section shall be invalid.

[3] La. Rev. Stat. 22:657 provides, in pertinent part:

> A. All claims arising under the terms of health and accident contracts issued in this state, [except claims for accidental death], shall be paid not more than thirty days from the date upon which written notice and proof of claim, in the form required by the terms of the policy, are furnished to the insurer unless just and reasonable grounds, such as would put a reasonable and prudent businessman on guard, exist. The insurer shall make payment at least every thirty days to the assured during that part of the period of his disability covered by the policy or contract of insurance during which the insured is entitled to such payments. Failure to comply with the provisions of this Section shall subject the insurer to a penalty payable to the insured of double the amount of the health and accident benefits due under the terms of the policy or contract during the period of delay, together with attorney's fees to be determined by the court. Any court of competent jurisdiction in the parish where the insured lives or has his domicile, except a justice of the peace court, shall have jurisdiction to try such cases.

In addition to his penalty claim under 22:657, in his original state court petition, Arana also sought penalties under Louisiana's Unfair Trade Practices and Consumer Protection Law, LA. REV. STAT. 51:1401-1420.

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OHP removed Arana's lawsuit to the Eastern District of Louisiana, on the grounds that the petition asserts claims that are completely preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. OHP then filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) or, alternatively, a motion for summary judgment. OHP's motion focuses on three issues: whether ERISA preempts LA. REV. STAT. 22:663, whether 22:663 prohibits the defendant from claiming subrogation and/or reimbursement rights, and whether Arana failed to exhaust the administrative remedies provided by an ERISA plan prior to filing suit. Arana filed a motion for partial summary judgment seeking a declaration that, under Louisiana law, OHP does not have a right to pursue subrogation and reimbursement for medical expenses that it paid on behalf of Arana from any amount received by Arana under the United Fire policy. The district court granted Arana's motion and denied the motion filed by OHP. In reaching its decision, the district court found that Arana's petition stated a claim for benefits under 29 U.S.C. § 502(a) that was completely preempted by ERISA.

Pursuant to 28 U.S.C. § 1292(b), OHP appeals the district court's order as to OHP's and Arana's respective motions. On appeal, Arana asserts that subject matter jurisdiction is lacking.[4]

Arana's unfair trade practices claim has since been withdrawn, and on appeal OHP does not argue that this claim supports federal jurisdiction. Accordingly, the withdrawn unfair trade practices claim will not be addressed further.

[4] Arana did not petition the district court to remand the instant action to state court, and first raised the argument that his claims were

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II. JURISDICTION

A. Complete Preemption and Removal

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. 1441(a). Moreover,

> "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

28 U.S.C. § 1441(b); *see also* 28 U.S.C. § 1331 (granting federal question jurisdiction to district courts). Because OHP is a citizen of Louisiana, removal to the district court was proper only if the instant action arises under federal law.

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not completely preempted by ERISA only in response to OHP's motion to dismiss. Nonetheless, we must examine the basis of our jurisdiction and, if there is doubt, we must address it. *Castaneda v. Falcon,* 166 F.3d 799, 801 (5th Cir. 1999); *Jones v. Collins,* 132 F.3d 1048, 1051 (5th Cir. 1998). Furthermore, when a action is under our appellate review, this Court also must satisfy itself that the district court properly exercised jurisdiction. *Heimann v. Nat'l Elevator Indus. Pension Fund,* 187 F.3d 493, 499 (5th Cir. 1999).

It is well settled that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. *Heimann v. Nat'l Elevator Indus. Pension Fund,* 187 F.3d 493, 499 (5th Cir. 1999) (citing *Gully v. First Nat'l Bank,* 299 U.S. 109 (1936); *Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149 (1908)). Accordingly, petitions, such as Arana's, that on their face assert only state law claims generally do not provide a basis for the exercise of federal question jurisdiction. In limited circumstances, however, "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 63-64 (1987). In effect, the application of the complete preemption doctrine converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. *McClelland v. Gronwaldt,* 155 F.3d 507, 512 (5th Cir. 1998) (citation omitted). Because they are recast as federal claims, state law claims that are held to be completely preempted give rise to federal question jurisdiction, and thus may provide a basis for removal. *Id.*

In particular, certain state law claims that fall within the scope of ERISA section 502(a), 29 U.S.C. § 1132(a), are completely preempted and may be removed to federal court. *See Metro. Life Ins. Co.,* 481 U.S. at 66; *Copling v. Container Store, Inc.,* 174 F.3d 590, 594 (5th Cir. 1999). "Section 502, by providing a civil enforcement cause of action, completely preempts any state cause of action seeking the same relief, regardless of how artfully pled as a state action." *Copling,* 174 F.3d at 594. Complete preemption under section 502(a) thus is jurisdictional in

nature, rather than an affirmative defense to a plaintiff's claims under state law. *Heimann,* 187 F.3d at 500.

Complete preemption must be distinguished in this regard from ordinary preemption, also known as conflict-preemption. In general terms, ordinary preemption is a federal defense to the plaintiff's suit, and may arise either by express statutory term or by a direct conflict between the operation of federal and state law. *Id.* at 500. In the context of ERISA, section 514(a) provides for the ordinary preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" regulated by that statute. 29 U.S.C. 1144(a). State laws preempted under section 514 therefore are displaced by federal law. *McClelland,* 155 F.3d at 516. However, because ordinary ERISA preemption almost invariably arises as a defense, and thus does not appear on the face of the plaintiff's well-pleaded complaint, ordinary ERISA preemption alone does not authorize removal to federal court. *Id.*; *see also Heimann*, 187 F.3d at 500.

Accordingly, in determining whether OHP properly removed the instant action to federal court, the dispositive issue is not whether ordinary ERISA preemption affords OHP an effective defense against Arana's state law claims. Irrespective of whether Arana's claims are subject to ordinary preemption pursuant to section 514, subject matter jurisdiction will not lie unless, through those claims, Arana seeks relief available to him under section

502(a).[5] *See Bauhaus USA, Inc. v. Copeland,* 292 F.3d 439, 442 n.6 (5th Cir. 2002); *McClelland,* 155 F.3d 518-19. It is to this inquiry that we now turn.

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[5] The parties dispute whether Arana's state law claims are subject to ordinary preemption. They specifically disagree on the issue of whether LA. REV. STAT. 22:663 and 22:657 are saved from preemption by ERISA section 514(b)(2), which states that "[n]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). The scope of this insurance "saving clause" is significantly limited by ERISA's "deemer clause," which provides that neither an ERISA plan nor any trust established under such a plan "shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." 29 U.S.C. § 1144(b)(2)(B); *see generally FMC Corp. v. Holliday,* 498 U.S. 52, 60-61 (discussing interaction of saving clause and deemer clause in ordinary preemption analysis of state anti-subrogation law).

"Previous panels of this Circuit, exercising great caution, have used a two-step analysis under both § 514 and § 502(a) in their complete preemption analysis." *Heimann,* 187 F.3d at 502 (discussing *McClelland*), 155 F.3d at 515-17; *see also Copling,* 174 F.3d at 597 n.14 (same). This approach has developed because the "deliberately expansive" nature of section 514 preemption almost always will encompass claims completely preempted by section 502 as well. *Heimann,* 187 F.3d at 502 (citation omitted). However, claims such as those asserted in the instant action, which arguably fall within the ambit of ERISA's insurance saving clause, present a situation in which the two-step analysis may become problematic. *See Rush Prudential HMO, Inc., v. Moran,* 536 U.S. ___, 122 S.Ct. 2151, 2165-67 (2002) (discussing conflict under ERISA between congressional policies of exclusively federal remedies and the reservation of insurance regulation to the states). For example, a plaintiff's cause of action may fall within the scope of section 502, and therefore arise under federal law, even though it is grounded in a state law rule of decision that, due to the operation of the saving clause, is not displaced by federal law. *See UNUM Life Ins. Co. v.*

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B. Arana's Claims under 22:663 and 22:657

Arana seeks two forms of relief in his state court petition. First, he requests a declaratory judgment to the effect that LA. REV. STAT. 22:663 bars OHP from asserting both its contractual right of subrogation to Arana's state law personal injury cause of action, and its right to reimbursement from tort settlement funds paid to Arana.[6]

Ward, 526 U.S. 358, 376-77 (1999) (applying state insurance law as rule of decision in section 502(a)(1)(B) suit to recover benefits).

In any event, because, as discussed below, the Court finds that Arana's state law claims are not completely preempted under section 502(a), it may remand without addressing the first step of the *McClelland* two-step complete preemption analysis, and without commenting on the merits of OHP's ordinary preemption defense. *Copling*, 174 F.3d at 597 n.14. Instead, the merits of this defense will be a matter for the state court to determine on remand. *See Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 410 (5th Cir. 1991).

[6] OHP's subrogation and reimbursement claims are based upon the following provision in the GHSA between OHP and LeCler Printing:

> If any Member is injured by an act or omission of a third party and if such third party and/or any other third party or entity, including but not limited to the Member's medical, health and accident, uninsured/underinsured motorist, school, and/or no fault insurer(s) (each referred to hereafter as a "Third Party"), is subsequently determined to be liable and/or responsible for the Expenses incurred because of such act or omission or by contract, O/SCHP will be subrogated to, and may enforce the rights of, the Member against the Third Party(ies) for such Expenses.
>
> In addition to and notwithstanding the subrogation rights granted to O/SCHP, by becoming a Member of O/SCHP and/or accepting benefits under O/SCHP and the provision of health care services by O/SCHP, including payment of the Expenses, each Member does hereby assign and shall be deemed to have assigned to O/SCHP all rights and claims against such Third Party(ies) for such Expenses, including the right to compromise claims independently of the Member, to

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Secondly, Arana requests statutory penalties and/or attorney's fees under LA. REV. STAT. 22:657 for what he claims was OHP's wrongful attempt to assert a lien against his tort settlement and to obtain reimbursement therefrom of the health benefits OHP has paid on Arana's behalf.

1. The 22:663 claim

In ruling that Arana's state court action was completely preempted by ERISA, the district court determined that Arana's declaratory judgment claim under 22:663 was in fact a claim for benefits, and thus fell within the scope of ERISA section 502(a)(1)(B).[7] The district court erred in

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> commence and prosecute any legal proceeding, and to pursue judgments through collection, in its name or in the Member's name. Any settlement, compromise, or release by a Member in favor of a Third Party, made in violation of the provisions of this [section], shall be deemed to include the full amount due O/SCHP, up to the amount of the settlement, compromise or release, regardless of whether the Member receives full or partial recovery from such Third Party, and any funds received by the Member shall be held in trust by the Member and/or his attorney or other representative and paid to O/SCHP without any deductions for attorneys' fees or other costs.

At the time the applicable GHSA was issued to LeCler Printing, OHP was known as Ochsner/Sisters of Charity Health Plan, Inc. (O/SCHP). Subsequently, the name was changed to Ochsner Health Plan, Inc. (OHP), which is used in this opinion.

[7] Section 502(a)(1)(B) creates a civil enforcement mechanism whereby an ERISA plan participant or beneficiary is authorized to bring a civil action "to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

that regard. It is undisputed that OHP has paid Arana all of the health benefits due him under the GHSA between OHP and LeCler Printing. Arana does not rely on 22:663 in order to seek additional health benefits from OHP, but rather he requests a declaration that OHP is not entitled to a portion of his tort recovery. Although OHP has not filed a formal claim for subrogation or reimbursement in either state or federal court,[8] it is OHP that seeks to obtain money from Arana, not vice versa.[9] Arana's claim thus is not one for benefits under section 502(a). *See Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir. 1997).

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[8] Apparently in support of its claim that the federal courts have jurisdiction over the instant action, OHP has asserted in a letter submitted to the Court under FED. R. APP. P. 28(j) that ERISA authorizes OHP to bring suit requesting the imposition of a constructive trust over that portion of Arana's settlement with United Fire that is being maintained in a trust account by Arana's attorney. In support of this argument, OHP cites *Bauer v. Gytter*, 2002 U.S. Dist. LEXIS 7246 (D.N.D. Apr. 22, 2002) and *Admin. Comm. of the Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Varco*, 2002 U.S. Dist. LEXIS 530 (N.D. Ill. Jan. 14, 2002). However, the fact that OHP may have a federal cause of action that it has chosen not to pursue, or even assert as a counterclaim in the instant action, does not convert Arana's state court declaratory judgment action to a claim arising under federal law and thus subject to complete preemption.

[9] Arana's case therefore does not present a situation in which a participant or beneficiary seeks benefits withheld by an ERISA plan pursuant to a plan provision authorizing coordination of benefits, *e.g.*, *Clancy v. Employers Health Ins. Co.*, 82 F. Supp. 2d 589, 596 (E.D. La. 1999), or in which a participant or beneficiary seeks to recover benefits she claims were wrongly reimbursed to an ERISA plan out of funds recovered from a third party, *e.g. Carducci v. Aetna U.S. Healthcare*, 204 F. Supp. 2d 796, 803 (D.N.J. 2002). The Court need not address whether a claim brought under the circumstances described in *Clancy* and/or *Carducci* is properly characterized as a claim for benefits under ERISA section 502(a)(1)(B).

OHP's assertion that Arana's 22:663 cause of action must be characterized as a claim for benefits because 22:663 on its face speaks only to the exclusion or reduction of benefits similarly is without merit. Arana's cause of action is completely preempted only if it seeks the same *relief* as that afforded beneficiaries under section 502(a), *see McClelland,* 155 F.3d at 518-19, and Arana's suit simply does not seek health care benefits under the LeCler plan. OHP argues as a substantive defense that 22:663 does not apply to circumstances such as those present here, in which a health plan does not coordinate or otherwise exclude benefits on the front end, but rather seeks subrogation or reimbursement on the back end. Whatever the merits of this defense regarding the scope of 22:663, it does not convert Arana's suit challenging OHP's subrogation and reimbursement rights into a claim for benefits. Just as OHP may assert its ordinary preemption defense in state court, OHP also may argue that 22:663 on its own terms does not apply to subrogation and reimbursement at all. However, if a federal defense does not authorize removal to federal court, *Heimann,* 187 F.3d at 500, this state law defense certainly does not do so.

Finally, as an alternative basis for complete preemption, OHP also argues that Arana's 22:663 cause of action is within the scope of 502(a) because through it Arana seeks "to enforce his rights under the terms of the plan." This theory draws some support as a basis for removal from a footnote in the recent Supreme Court decision *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. ___, 122 S.Ct. 2151 (2002).

In *Rush Prudential,* an ERISA plan participant filed a state court action seeking an order requiring the plan's service provider to comply with a state independent

medical review law. *See Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 964 (7th Cir. 2000). When the service provider sought to remove the original state action to federal court, the district court remanded on the ground that the participant's suit for specific performance of state law obligations was not completely preempted by ERISA. *Id.* The participant then filed an amended complaint seeking benefits under the plan, and the service provider successfully removed this amended complaint to federal court. *Id.* at 965-67. The case later came before the Supreme Court on review, and the Court in *dicta* questioned the propriety of the district court's first remand order. The *Rush Prudential* Court specifically stated,

> a suit to compel compliance with [the state independent medical review law] in the context of an ERISA plan would seem to be akin to a suit to compel compliance with the terms of the plan under 29 U.S.C. § 1132(a)(3). Alternatively, the proper course may have been to bring a suit to recover benefits due, alleging that the denial was improper in the absence of compliance with [the state law]. We need not resolve today which of these options is more consonant with ERISA.

122 S.Ct. at 2157 n.2.

Although this footnote appears to suggest that a cause of action seeking a declaration that state law trumps plan documents may be properly characterized, in some circumstances, as a completely preempted claim to enforce the terms of the plan, this Court is not persuaded that such a characterization is appropriate under the facts of this case. In the first instance, the Court notes that the terms of the LeCler plan are not in the record on appeal, and it is not clear whether such plan documents exist at

all. The parties apparently take for granted that the terms of the GHSA between the LeCler plan and OHP, its health care services provider, are the equivalent of, or are somehow incorporated into, the plan's terms. The fact that the terms of the LeCler plan are so immaterial to Arana's claims that they were never introduced into the record, even when dispositive motions were before the district court, certainly undermines any argument that Arana's cause of action is really an artfully pleaded bid to enforce the terms of his ERISA plan.

Moreover, assuming *arguendo* that the terms of the GHSA are properly considered to be the terms of the LeCler plan, such an assumption still does not justify characterizing Arana's claim as one to enforce the plan's terms. Arana does not dispute that the GHSA affords OHP the subrogation and reimbursement rights it claims. Arana in fact concedes that he would owe a portion of his tort recovery to OHP if the terms of the GHSA were enforced, but he argues that the relevant provisions in the GHSA are illegal by operation of 22:663.[10] Although

[10] Arana's claim is in this regard distinguishable from the claim at issue in the second footnote of the Supreme Court's *Rush Prudential* opinion. In *Rush Prudential,* the ERISA plan participant argued that the relevant state law created an extra condition with which the plan was required to comply in the course of making benefit determinations. As a result, the participant essentially claimed that the state law operated to insert additional terms into the plan. In contrast, Arana asserts that the subrogation and reimbursement provisions contained in the GHSA are illegal under 22:663, not that 22:663 imposes additional duties on OHP. If the subrogation and reimbursement provisions are struck from the GHSA, as Arana asserts that 22:663 requires, the GHSA still will not afford Arana any affirmative right, enforceable under section 502(a)(1)(B), to retain possession of the full amount of his tort settlement.

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Arana's suit to enforce state law over the terms of the plan may be "akin" to a suit to enforce the terms of the plan itself, the fact that a claim is akin to a cause of action authorized under section 502(a) is not enough to support a federal claim under ERISA. This latter point recently has been demonstrated by the Supreme Court itself, which, when squarely confronting the issue, has made fine distinctions in order to determine whether a civil enforcement action is in fact authorized by ERISA. *See Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S.Ct. 708, 714-717 (2002). "ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 712 (emphasis in original) (internal quotations omitted). Congress has not incorporated into section 502(a) a cause of action to enforce an arguably saved state law over the terms of an ERISA plan, and this Court declines OHP's invitation to read this civil enforcement mechanism into the statute.[11]

Furthermore, Arana's claim is not subject to the alternative characterization discussed in *Rush Prudential*'s footnote two, further limiting the applicability of that footnote to the instant case. The plaintiff-participant in *Rush Prudential* had not yet received all of the health care benefits she claimed were due her under the terms of the plan, and ultimately sought to obtain additional benefits upon the completion of the independent medical review she requested. As discussed above, unlike the plaintiff in *Rush Prudential,* Arana already has received all of the benefits due him under the terms of the LeCler plan.

[11] This Circuit previously has refused to comment on the scope of complete preemption under section 502(a), and specifically has refused to address whether the complete preemption doctrine extends only to claims under section 502(a)(1)(B). *See Giles v. NYLCare Health Plans,*

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Because Arana neither relies on 22:663 to seek benefits under the plan nor seeks to enforce the terms of the plan, his 22:663 cause of action does not fall within the scope of section 502(a) and is not completely preempted by ERISA.[12]

2. The 22:657 claim

LA. REV. STAT. 22:657 allows punitive damage awards for an insurer's arbitrary refusal to pay benefits, and mandates the payment of attorney's fees when such a refusal occurs. *Cramer v. Ass'n Life Ins. Co.*, 569 So. 2d 533, 538 (La. 1990). In his petition, Arana claims that 22:657 entitles him to statutory penalties and attorney's

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Inc., 172 F.3d 332, 336 n.6; *McClelland*, 155 F.3d at 517 n.34. Assuming *arguendo* that complete preemption under section 502(a) is not so limited, Arana's 22:663 claim would not fall within the scope of section 502(a)(3) for the same reasons it cannot be characterized as a suit under section 502(a)(1)(B) to enforce the terms of the LeCler plan. Section 502(a)(3) authorizes plan beneficiaries to bring civil enforcement actions only "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). Even putting aside for a moment the potentially problematic technical distinctions between legal and equitable remedies, *see Great-West Life & Annuity Ins. Co.*, 122 S.Ct. at 714-17, Arana alleges that OHP's subrogation and reimbursement claims violate 22:663, not ERISA and not the terms of the LeCler plan.

[12] The Court notes that on one previous occasion a panel of this Circuit has assumed jurisdiction and ruled on the merits of a claim seeking, under Mississippi law, relief similar to the declaratory judgment requested by Arana. *See Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938 (5th Cir. 1998) (per curiam). "Even though subject matter can be raised *sua sponte*, we take nothing away from our failure to do so" in *Walker. Giles*, 172 F.3d at 338 n.12.

fees for OHP's wrongful assertion of subrogation and reimbursement rights.

In contrast to 22:657, ERISA's civil enforcement scheme does not afford plan participants or beneficiaries a mechanism for obtaining punitive damages and mandatory attorney's fees such as those sought by Arana.[13] *See Ramirez v. Inter-Continental Hotels,* 890 F.2d 760, 763-64 (5th Cir. 1989); *Sommers Drug Store Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.,* 793 F.2d 1456, 1463-65 (5th Cir. 1986); *Cramer,* 569 So. 2d at 538. Arana's 22:657 claim cannot "arise under" ERISA for purposes of federal question jurisdiction if ERISA does not authorize the suit. *Bauhaus,* 292 F.3d at 442 n.6 (citing *Franchise Tax Bd. v. Construc. Laborers Vacation Trust,* 463 U.S. 1 (1983); *Metro. Life Ins. Co.,* 481 U.S. 58 (1987)). Because section 502 does not authorize the relief sought in Arana's 22:657 cause of action, that cause of action cannot form the basis of federal question jurisdiction. *Id.; see also McClelland,* 155 F.3d at 518.

The cases cited by OHP for their holdings that 22:657 is preempted by ERISA do not warrant a contrary result. Almost all of the cases addressing the issue hold that 22:657 is subject to ordinary preemption under ERISA section 514. *See, e.g., Clancy v. Employers Health Ins. Co.,* 101 F. Supp. 2d 463, 466-67 (E.D. La. 2000); *Chatelain v. S. Baptist Health Sys.,* 907 F. Supp. 206, 208-12 (E.D. La. 1995); *Coles v. Metro. Life Ins. Co.,* 837 F. Supp. 764, 768

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[13] While ERISA does not authorize punitive damages at all, it does authorize the discretionary award of attorney's fees to a plan participant or beneficiary. 29 U.S.C. § 1132(g)(1).

(M.D. La. 1993); *Cramer,* 569 So. 2d at 537-541. Notably, many of these cases specifically find that 22:657 is preempted because it creates an alternative remedy that is not authorized under ERISA's civil enforcement scheme. *E.g., Clancy,* 101 F. Supp. 2d at 467; *Cramer,* 569 So. 2d at 538. The fact that a state law conflicts with ERISA, and thus arguably is subject to ordinary preemption, does not authorize removal to federal court. *See McClelland,* 155 F.3d at 516; *Heimann,* 187 F.3d at 500. In the one case cited by OHP that determines that a 22:657 cause of action is completely preempted by ERISA, the district court overlooked this fundamental point of law. *See Taylor v. Blue Cross/Blue Shield,* 684 F. Supp. 1352, 1358-59 (E.D. La. 1988).

OHP's argument that ERISA section 502(a) displaces 22:657 is a defense to Arana's 22:657 claim, and not a basis for converting Arana's state law claim to one arising under federal law. Such a conversion would be impossible, as Arana's state law claim for punitive damages and mandatory attorney's fees is not authorized under section 502(a). OHP accordingly must assert this defense, as well as any other defense it may have to Arana's 22:657 cause of action, before the state court on remand.

III. CONCLUSION

Arana does not seek relief available under ERISA section 502(a), and accordingly his state law claims under La. Rev. Stat. 22:663 and 22:657 are not completely

preempted by federal law.[14] Because subject matter jurisdiction is lacking, we direct that the instant action be remanded to state court.

[14] On appeal, OHP argues for the first time that Arana's class allegations are preempted by the Medicare Act, 42 U.S.C. § 1395, and that this Medicare Act preemption provides an additional ground for the exercise of federal question jurisdiction. OHP did not raise this issue either in its Notice of Removal or at any time during which this case was pending before the district court, and we will not consider it now. In any event, there is insufficient information in the record to evaluate this claim by OHP, even if we were to reach its merits.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-00020

JULIO C ARANA

Plaintiff-Respondent

v.

OCHSNER HEALTH PLAN

Defendant-Petitioner

Petition for Leave to Appeal
from an Interlocutory Order

(Filed Aug. 10, 2001)

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court, for the Eastern District of Louisiana, New Orleans, entered on June 29, 2001, is granted.

/s/

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JULIO C. ARANA	CIVIL ACTION
VERSUS	NO: 00-1064
OCHSNER HEALTH PLAN, INC.	SECTION: "S" (1)

ORDER AND REASONS

(Filed Jun. 29, 2001)

IT IS HEREBY ORDERED that Ochsner Health Plan Inc.'s (Ochsner) "Motion for Reconsideration" of this court's order denying Ochsner's "Motion to Dismiss Pursuant to Rule 12(b)(6) or, alternatively, Motion for Summary Judgement," entered on March 13, 2001, is **DENIED**.

IT IS FURTHER ORDERED that Ochsner's alternative "Motion for Certification Pursuant to 28 U.S.C. § 1292(b)" is **GRANTED**. (Document #108.) The court's order involves controlling questions of law as to which there is substantial ground for difference of opinion concerning exhaustion of administrative remedies and the application of La. Rev. Stat. 22:663. An immediate appeal from the order may materially advance the ultimate termination of the litigation.

IT IS FURTHER ORDERED that all proceedings in this court are **STAYED** pending completion of the appellate process.

IT IS FURTHER ORDERED that the scheduling order is **VACATED** pending Ochsner's appeal of the court's March 13, 2001, order, to be reset following the disposition of the appeal.

New Orleans, Louisiana, this 29 day of June, 2001.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JULIO C. ARANA	CIVIL ACTION
VERSUS	NO: 00-1064
OCHSNER HEALTH PLAN, INC.	SECTION: "S" (1)

ORDER AND REASONS

(Filed Mar. 13, 2001)

IT IS HEREBY ORDERED that Ochsner Health Plan, Inc.'s "Motion to Dismiss Pursuant to Rule 12(b)(6) or, Alternatively, Motion for Summary Judgment" is **DENIED**. (Document #43.)

IT IS FURTHER ORDERED that Julio C. Arana's motion for partial summary judgment declaring that Ochsner Health Plan, Inc. has no subrogation claims against Arana under the United Fire & Casualty Company policy is **GRANTED**. (Document #75.)

I. BACKGROUND

On July 5, 1998, Julio C. Arana was seriously injured in an automobile accident when a 1996 Ford Crown Victoria struck the rear of a 1995 Nissan Pathfinder, operated by Arana and owned by his mother, Odette LeCler. Arana is included as a "dependent insured" in the Ochsner Health Plan Inc.'s (Ochsner) group health insurance

plan,[1] a fully insured plan, established by LeCler Printing Company, Inc. Ochsner assumed responsibility for the health care services required as a result of the accident.[2]

Coverage for the accident was available under four individually underwritten insurance policies. Arana's mother and stepfather, Emile J. LeCler had in force uninsured motorist coverage of $500,000 with Fireman's Fund Insurance Company and excess uninsured and/or with United Fire in the amount of $2,000,000, subject to $650,000 in underlying limits. Fireman's Fund paid Arana $487,500, and Arana entered into a settlement agreement with United Fire in November 2000 in case No. 98-2927 in the Eastern District of Louisiana.[3] State Farm, which insured the Crown Victoria involved in the accident, settled with Arana for its $100,000 policy limit. Allstate paid a $50,000 limit under a policy issued to the non-owner operator of the Crown Victoria.

Ochsner administers its subrogation rights through Subro Audit, Inc., a third-party contractor and subrogation specialist. On November 2, 1998, Subro Audit informed Odette LeCler that Ochsner sought to obtain reimbursement of the medical expenses paid on Arana's behalf from Fireman's Fund, United Fire, or any other insurer under a

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[1] Arana is covered under Ochsner's Total Health Choice 2-50 Health Service Agreement (a program for employers with two to fifty employees). Ochsner offers two additional Health Services Agreements: Total Health 65 and Total Health One-all.

[2] The total charges amounted to approximately $180,000.

[3] Arana's motion is limited to subrogation as to the United Fire uninsured coverage.

subrogation and reimbursement provision of the Ochsner plan.

Arana disputed Ochsner's right to pursue recovery and filed a petition for damages in the 24th Judicial District Court for the Parish of Jefferson on his own behalf and on behalf of similarly situated individuals against whose recovery Ochsner has filed liens. Ochsner removed the case to federal court, asserting that any claims arising under the policy are governed by the Employers Retirement Insurance Security Act (ERISA), which preempts the state law claims. Arana alleges that Ochsner has no right to seek subrogation or reimbursement against Arana, Fireman's Fund, or United Fire and requests declaratory judgment that the provisions of the policy violate La. Rev. Stat. 22:663 and 22:2006(7).[4]

Ochsner filed a motion to dismiss and, alternatively, for summary judgment. Ochsner's motion focuses on three issues: whether ERISA preempts La. Rev. Stat. 22:663, whether La. Rev. Stat. 22:663 prohibits the defendant from claiming subrogation, and whether Arana failed to exhaust the administrative remedies provided by an ERISA plan before filing suit.[5] Arana filed a motion for partial summary judgment on the issue whether Ochsner has a right under Louisiana law to pursue subrogation and reimbursement for medical expenses that it paid on behalf of

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[4] La. Rev. Stat. 22:663 is made applicable to HMO's through La. Rev. Stat. 22:2006(7).

[5] Arana's claims for unfair trade practices under La. Rev. Stat. 51:1401 *et. seq.* have been withdrawn.

Arana from any amount received by Arana under the United Fire policy.

II. DISCUSSION

A. Summary judgment standard

Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The nonmovant cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). A fact is "material" if its resolution in favor of one party might affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).

B. Failure to exhaust administrative remedies

Ochsner asserts that Arana's claims should be dismissed because he has failed to exhaust the administrative remedies outlined in the plan prior to seeking judicial review of his claims.

"[C]laimants seeking benefits from an ERISA plan must first exhaust available administrative remedies

under the plan before bringing suit to recover benefits." *Bourgeois v. Pension Plan for Employees of Santa Fe Int'l Corp.*, 215 F.3d 475, 479 (5th Cir. 2000). The policy behind the exhaustion requirement includes Congress' desire that ERISA trustees be responsible for the actions of plan administrators and that there be a clear record of administrative action. *Id.* at n.4.

Section 14 of the Ochsner plan provides:

> **Exhaustion of Administrative Remedies**. No action at law or in equity may be brought in connection with a dispute between O/SCHP[6] and a Member until that Member has made a written claim to O/SCHP and exhausted the remedies of the grievance procedure established by O/SCHP.

Article XI, section 2 of the plan addresses the Grievance Procedure established to address claims of wrongful denial of benefits:

> Grievances regarding other (non MM[7]) matters are pursued through the general O/SCHP Member Grievance Procedure. The provisions of this general O/SCHP Member Grievance Procedure are set forth in Section 4 of "Additional Important Information.". . . .

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[6] Ochsner/Sisters of Charity Health Plan.

[7] Medical Management (MM) is defined in Article I:

> (ff) The screening techniques used by the Medical Management Department to insure the Medical Necessity and Appropriateness of a selected procedure or other health service based on O/SCHP approved criteria and to provide for an enhanced matching of Member's needs and location of service.

Section 4 of "Additional Important Information" provides a grievance procedure for non-MM related matters. Section 4(h) relates to "Administrative Related Procedures":

> If you have a concern, problem or complaint that is administrative in nature, which means that it involves administrative matters, administration procedures or other non-benefit related matters, and does not involve benefit denial claims or disenrollment grievances, you should put it in writing and direct it to the Members Services Department. . . .
>
> The Manager of Member Services will present your administrative concern, problem or complaint to the Executive Committee for review in accordance with the Committee's established procedures and guidelines.
>
> The Executive Committee will furnish its decision on review to the Manager of Member Services, who will then notify you, in writing, of the decision rendered.

Ochsner has clearly delegated the subrogation and reimbursement procedures to Subro Audit, rather than the Manager of Member Services. Subro Audit gave Odette LeCler and United Fire formal notice of Ochsner's alleged contractual recovery rights on November 2, 1999. Counsel for Arana responded that Ochsner has no right to coordinate benefits or seek subrogation or reimbursement under Louisiana law. Subro Audit responded that La. Rev. Stat. 22:663 is not an anti-subrogation statute and that Arana must reimburse Ochsner for the benefits paid if he recovers from a "tortious party" and/or the insurer. Arana did not receive notice of a process to appeal the decision of

Subro Audit, and there is no evidence that Ochsner has provided an appeal process for "non-benefit related" subrogation decisions delegated to Subro Audit. Accordingly, to the extent that Arana was required to exhaust administrative remedies, Arana's communication with Subro Audit constitutes exhaustion of available administrative remedies. Ochsner's motion for summary judgment on this issue is denied.

C. Preemption of § 22:663

Ochsner asserts that the case is governed by ERISA and that Arana is not entitled to relief under La. Rev. Stat. 22:663 because ERISA preempts state law claims.[8] Ochsner contends that Arana's claims directly relate to Ochsner's administration and enforcement of the Group Health Services Agreement, an ERISA-governed plan; therefore, Arana's request for a declaration that the plan violates § 22:663 should be dismissed.

ERISA § 502(a) provides that a participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Section 502(a) provides the exclusive remedy for enforcing ERISA. *See Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549, 1555 (1987).

"ERISA's preemption clause dictates that ERISA 'shall supersede any state causes of action insofar as they may

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[8] For purposes of this motion, Arana concedes that the employee benefit plan is regulated by federal law under ERISA.

now or hereafter relate to any employee benefit plan.'" *Dowden v. Blue Cross & Blue Shield of Tex., Inc.*, 126 F.3d 641, 643 (5th Cir. 1997) (quoting 29 U.S.C. § 1144(a)). "A state cause of action relates to an employee benefit plan whenever it has a connection with or reference to such a plan." *Id.* (internal quotation and citation omitted). However, ERISA provides that regulation of the business of insurance is returned to the states:

> The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA. The saving clause returns to the States the power to enforce those state laws that "regulat[e] insurance," except as provided in the deemer clause. Under the deemer clause, an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.

FMC Corp. v. Holliday, 111 S.Ct. 403, 407 (1990).

The Supreme Court has "repeatedly held that state laws mandating insurance contract terms are saved from preemption under § 1144(b)(2)(A)." *See UNUM Life Ins. Co. of America v. Ward,* 119 S.Ct. 1380, 1390 (1999). A contrary interpretation would effectively read the savings clause out of ERISA. *Id.*

Ochsner argues that § 22:663 does not prohibit subrogation and that Arana is attempting to read into that statute an anti-subrogation prohibition. Ochsner maintains that the intent of the legislature was to prohibit the "coordination of benefits" or the denial or limitation on the

payment of benefits by health carriers on the basis that the insured may also be covered under a plan of individually underwritten insurance. Ochsner asserts that the statute is not implicated in this case because it paid all covered medical expenses arising out of the accident and that it did not "coordinate benefits" on the "front end" with any other individually underwritten contract or plan in violation of § 22:663.

Arana argues that Ochsner's policy violates § 22:663 by excluding or reducing coverage by recouping any recovery received by him under the individually underwritten United Fire policy. Arana contends that the provisions on subrogation and assignment of rights in Article X of the policy are invalid because Ochsner cannot recover on the "back end" for the payment of benefits it could not have excluded or reduced in the first place under the prohibition of § 22:663.

The statute states in relevant part:

> [N]o group policy of accident, health or hospitalization insurance, or of any group combination of these coverages, shall be issued by any insurer doing business in this state which by the terms of such policy group contract excludes or reduces the payment of benefits to or on behalf of an insured by reason of the fact that benefits have been paid under any other individually underwritten contract or plan of insurance for the same claim determination period. Any group policy provision in violation of this section shall be invalid.

La. Rev. Stat. 22:663 is a law that "relates to" an employee benefit plan. Further, § 22:663 is a law that "regulates insurance." *See Clancy v. Employers Health Insurance Co.,*

82 F.Supp. 2d 589, 596 (E.D. La. 1999). Because the Ochsner plan is insured, not self-funded, the statute regulating insurance escapes complete preemption under the saving clause. *Id.* & n.10; *see also FMC Corp.*, 111 S.Ct. at 409 (employee benefit plans that are insured are subject to indirect state insurance regulation"). Accordingly, Arana's action is brought under § 502(a) of ERISA, and La. Rev. Stat. supplies the "rule of decision" for the claim.[9] *See Clancy*, 82 F.Supp. 2d at 597.

The prohibition of § 22:663 applies when a group policy insurer reduces benefits by the amount paid by the individual policy insurer. *See Nolan v. Golden Rule Ins. Co.*, 171 F.3d 990, 993 (5th Cir. 1999). "The intent of the legislature was to prohibit coordination of benefits where individually underwritten and group insurance policies are involved." *Tailey v. Enserch Corp.*, 589 So.2d 615, 622 (La. Ct. App. 1991) (citing *Ermert v. Union Labor Life Ins. Co.*, 339 So.2d 927, 929 (La. Ct. App. 1976)) (agreeing with the trial court that plaintiff was not entitled to reimbursement from both policies because both of the policies were group policies).

Ochsner seeks to reduce the group plan benefits it paid by the amounts paid under the individually underwritten uninsured motorist policy issued by

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[9] Arana's argument that his claim is brought only under state law because it is not a claim to obtain benefits is unconvincing. Even though the benefits have been paid, Ochsner is attempting to reduce the amount of the benefits paid under the health plan. The claim is brought under § 502(a), and § 22:663 applies because it is saved as a state law that regulates the business of insurance. (Arana conceded for purposes of this motion that the plan is regulated by federal law under ERISA.)

Fireman's Fund, the excess uninsured and/or underinsured motorist coverage from United Fire, and any other insurer. It is clear from the language of the statute that the legislature intended to prohibit such a reduction in benefits in insurance contracts. Section 22:663 specifically imposes the prohibition when benefits are paid under "any other individually underwritten contract," as opposed to payments under other group plans. Further, there is no language limiting the prohibition to the "front end" time frame in which the group health plan is paying its benefits. Therefore, the provision of the group policy requiring subrogation of rights under an individually underwritten policy is invalid under § 22:663.[10] *See Peters v. Prudential Ins. Co. of America,* 511 So.2d 37, 39 (La. Ct. App. 1987).

Accordingly, there are no disputed issues of material fact, and Arana's motion for partial summary judgment declaring that Ochsner has no subrogation claim against Arana under the United Fire policy is granted. Ochsner's

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[10] Ochsner's argument that the application of § 22:663 will improperly lead to a double recovery has no merit. "Under the 'collateral source' rule [Louisiana] courts permit recovery of damages incurred by a plaintiff which he will never have to pay since they have been paid from another source. A plaintiff in a personal injury action has never been required to pay or show that he is able to pay expenses incurred in order to recover them." *Great Southwest Fire Ins. v. CNA Ins.,* 547 So.2d 1339, 1347-48 (La. Ct. App. 1989). *See also Reichenpfader v. Paccar, Inc.,* 872 F.Supp. 328 (E.D.La. 1994) (citing *Hudson v. Thompson,* 422 So.2d 640 (La. Ct. App. 1982)) ("[U]nder Louisiana's 'collateral source' rule, an injured plaintiff's tort recovery is not diminished because of insurance benefits received from sources independent of the tortfeasor's procuration or contribution.").

"Motion to Dismiss Pursuant to Rule 12(b)(6) or, Alternatively, Motion for Summary Judgment" on the issues whether ERISA preempts § 22:663 and whether § 22:663 prohibits the defendant from claiming subrogation is denied.

New Orleans, Louisiana, this 13th day of March, 2001.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE